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No. 85-1660

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GROUP W CABLE, INC.,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
and COX CABLEVISION CORPORATION,
Appellants,

v.

FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO MOTIONS TO AFFIRM

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OPPOSITION TO MOTIONS TO AFFIRM

Appellants Group W Cable, Inc., National Cable Television Association, Inc., and Cox Cablevision Corporation ("Cable Operators")[1] hereby oppose Appellees' motions to affirm filed May 9, 1986.[2]

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[1] The Cable Operators' statement pursuant to Supreme Court Rule 28.1 is set forth in their Jurisdictional Statement.

[2] Appellee Florida Power Corporation's Motion to Affirm will be cited as "Florida Power Motion." The motion filed by Appellees Tampa Electric Co., Alabama Power Co., Mississippi Power & Light Co., and Arizona Public Service Co. will be cited as "Utility Parties Motion." The Appendix to the Cable Operators' Jurisdictional Statement will be cited as "App. ___."

In its decision below, the Eleventh Circuit declared a federal statute—the 1978 Pole Attachment Act—unconstitutional. Congress intended the Act to provide relief to cable television operators from the oppressive practices of monopolistic public utilities, and thereby to promote First Amendment diversity by enhancing the provision of cable service across the nation.[3] The statute freed cable operators from exploitation at the hands of utilities, and ensured that cable subscribers would not unfairly be required to subsidize utility service.

By striking down the Act, the Eleventh Circuit has frustrated clear congressional policy, and has wiped out a regulatory scheme vital to more than 6600 cable systems serving over forty million subscribers. The Court of Appeals has also invited utilities to reimpose rates even higher than those they were able to coerce prior to regulation. It has been estimated that "[w]ithout regulation, pole fees could quickly rise to more than $300 mil[lion]/year," and threaten cable service to subscribers of marginal systems.[4]

Since 1978 regulation under the Act has been reviewed, refined, and approved on three occasions by the United States Courts of Appeals.[5] Throughout the

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[3] *See, e.g.*, S. Rep. No. 580, 95th Cong., 1st Sess. 12-14 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 109, 120-122.

[4] Paul Kagan Associates, Inc., *Cable TV Franchising*, at 3 (Oct. 14, 1985). Because the court below declared the entire regulatory scheme unconstitutional, the Utility Parties' characterization of this case as involving only "several thousand dollars in pole attachment fees" (Utility Parties Motion at 3) is plainly disingenuous and merits no further response.

[5] *See Texas Power & Light Co.* v. *FCC*, 784 F.2d 1265 (5th

Act's eight-year history, no court had ever questioned its constitutionality. Indeed, not even Florida Power argued below that the Act was facially invalid. The utilities' constitutional arguments to the Commission and the Eleventh Circuit challenged only the statute *as applied*, and were exclusively directed to the *actual* rates set by the agency. The Eleventh Circuit nevertheless failed even to consider the rates set by the Commission, but rather leaped to the much broader and far-reaching issue of the facial constitutionality of the Pole Attachment Act.[6]

Not only did the Eleventh Circuit invalidate an Act of Congress crucial to the continued development of cable television, but it did so in sweeping terms that raise serious questions about the powers of administrative agencies. The Eleventh Circuit ruled that an administrative agency may not set just compensation under the Takings Clause, even where its determination is subject to judicial review:

> Does the FCC, an administrative agency, have the power to determine what is or is not just compensation for purposes of the Fifth Amendment Takings Clause? In our opinion, it does not. [App. 13a.]

Cir. 1986); *Alabama Power Co.* v. *FCC*, 773 F.2d 362 (D.C. Cir. 1985); *Monongahela Power Co.* v. *FCC*, 655 F.2d 1254 (D.C. Cir. 1981) (per curiam).

[6] Contrary to Florida Power's unsupported assertion (Florida Power Motion at 6 n.8), this issue was not briefed or argued by the parties below. Far from challenging the Act's constitutionality or the FCC's authority to set pole rates, Florida Power requested the Court of Appeals to remand this proceeding for a redetermination of a just and reasonable rate by the Commission. Brief of Petitioner Florida Power Corp. Before the Eleventh Circuit, at 54 (Dec. 27, 1984) ("Florida Power Brief ").

In an attempt to narrow this remarkable holding, Appellees misconstrue the Act. They argue that the Act is invalid because it prescribes a "binding rule" for pole attachment fees that limits even judicial review. The argument is as incorrect as it is extraordinary:

- The Act sets no rigid compensation ceiling. It is up to the Commission to establish the "rate of return" or profit the utility receives for pole attachment services.[7] The Commission similarly decides which costs should be allocated to cable operators in setting pole attachment rates.
- The Act does not purport to bind the courts in their review of FCC orders under the Act.
- The Act does not limit the discovery or hearing procedures used by the FCC, or the manner in which the Commission may develop a factual record.[8]

Although the parties disagree as to what the Takings Clause requires, there can be no doubt that the decision below directly challenges the role played by agencies and Congress in any regulatory scheme that

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[7] *See Alabama Power*, 773 F.2d at 372.

[8] This Court has rejected the argument that a court is limited or bound by an administrative record if that record does not permit the court to evaluate claims raised on petition for review under the Administrative Procedure Act. *See FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468-469 (1984) ("If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency [for further proceedings] * * *") (citation omitted).

might be deemed to effect a taking.[9] The case plainly warrants full briefing by the parties and full review by this Court.

The decision below also demands full review due to its unwarranted extension of *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *Loretto* established a "very narrow" *per se* rule for government-mandated, permanent, physical occupations of property. *Id.* at 441. By applying *Loretto* in this case, the Eleventh Circuit has called into question scores of commonplace regulations that involve physical connections to utility property. The decision below extends the *per se* test to the regulation of rates charged by a public utility:

- for the ancillary use of equipment installed and used for the provision of the utility's primary service;
- for the use of surplus space on utility poles that may be reclaimed by the utility, under contract, whenever the utility needs the space to provide service;
- for service to certain customers where the revenues generated offset the revenue re-

[9] As shown in the Cable Operators' Jurisdictional Statement at 21-24, several federal agencies set just compensation for takings effected by statutory schemes, including the Environmental Protection Agency and the Interstate Commerce Commission. Even the just compensation for the taking addressed in *Loretto* has been set by an administrative agency pursuant to statutory guidelines, subject to judicial review. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 152, 446 N.E.2d 428, 434, 459 N.Y.S.2d 743, 749 (1983).

quirement otherwise obtained from other customers;

- for provision of a service voluntarily provided by the utility.

Appellees' reliance on *Loretto* seems to be largely based on the coincidence that both cases involve the attachment of cable distribution facilities. This superficial analysis provides no justification for extending *Loretto*'s narrow *per se* rule to this case. Nowhere do the utilities deny that the contracts at issue permit the utility to reclaim space occupied by a cable operator whenever that space is needed for utility service.[10] Nor do the utilities deny that pole attachment rate regulation has no effect on their overall revenues, unlike the regulation at issue in *Loretto*.[11] The utilities do not deny that they voluntarily entered their pole attachment arrangements. Finally, they do not deny that they are subject to other physical connections to their distribution plant as the *quid pro quo*

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[10] Although Florida Power suggests in a footnote that the FCC might not permit utilities to reclaim pole space if needed for utility service (Florida Power Motion at 11 n.12), the FCC has never been called upon to address the issue during the eight years it has administered the Act. Utilities have apparently had no difficulty in enforcing these contractual provisions.

[11] The Utility Parties suggest that a utility might lose revenue due to pole attachment rate regulation if the utility failed to file for a general rate increase. Utility Parties Motion at 14. The utility would, however, have only itself to blame for any such indifference to its revenue requirement. As Florida Power conceded below, the Act simply "serves to transfer monies from Florida Power's electric power users to two * * * telecommunication companies." Florida Power Brief at 14, 37-39.

for their government-authorized monopolies. Although the utilities note that the landlord in *Loretto* was also subject to some regulation,[12] they fail to mention that, unlike a landlord, a utility is granted legal monopoly status and is therefore required to endure physical connections to its plant to avoid exploitation of its monopoly.[13]

CONCLUSION

The Eleventh Circuit has violated the most basic precepts of judicial restraint by declaring an Act of Congress unconstitutional, *sua sponte*, on grounds neither briefed nor argued below. In so ruling, the Court of Appeals invalidated a vital and effective regulatory scheme that has been refined and approved by federal courts. It has also called into question regulation required by a utility's government-authorized monopoly, as well as the proper role of federal agencies and Congress in providing for just compensation for takings. Nothing could be clearer than that the decision below should be reviewed by this Court based on a

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[12] Florida Power Motion at 13-14; Utility Parties Motion at 11 n.7.

[13] Appellees' reliance on the plurality opinion in *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 106 S. Ct. 903 (1986), is misplaced. That case did not involve a takings issue, but rather an attempt to penalize a utility's exercise of its First Amendment rights by ordering the placement of a third party's newsletter in the utility's billing envelope. *Id.* at 907-914. The First Amendment analysis in *Pacific Gas & Electric* has no application to the Fifth Amendment issues raised here.

full briefing on the merits. For the reasons set forth above and in the Cable Operators' Jurisdictional Statement, this Court should deny Appellees' motions for summary affirmance, note probable jurisdiction, and reverse the judgment below.

Respectfully submitted,

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